

TAB 6



INDIGENOUS LAW

Issues 2016

The Impact of the *Daniels* Case

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November 14, 2016

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The Impact of the Daniels Case

Law Society of Upper Canada Continuing Professional Development Indigenous Law Issues

November 14, 2016

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INTRODUCTION

- This presentation will provide a broad overview of the historical and legal impacts of aboriginal identity and its impact on the relationship with Canada.
- This presentation will focus on the Métis and non-status Indians of Canada.
- In particular, the impact of the recent Supreme Court of Canada decision, *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (*Daniels*)



BACKGROUND

- 1754 – DEPARTMENT OF INDIAN AFFAIRS CREATED AND PLACED UNDER MILITARY CONTROL
- 1759 – FALL OF NEW FRANCE
- 1763 – ROYAL PROCLAMATION SIGNED BY KING GEORGE III
- 1794 – JAY TREATY SIGNED BETWEEN GREAT BRITAIN AND THE U.S.A.

LEGISLATIVE ACT - ENFRANCHISEMENT

- *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*
- This legislation passed in 1857, introduced the concept of enfranchisement: an Indian male who could speak English or French, and was found by a panel of colonial administrators to be "of sober and industrious habits, free from debt and sufficiently intelligent to be capable of managing this own affairs" could surrender his Indian identity and right to share in Indian common lands, and become "enfranchised."
- Subsequent amendments, would allow for the right to vote in Canadian elections, and be in other respects the equal under civil law of his non-Indian counterpart.
- In effect, they would become non-status Indians.

IMPORTANT DATES

- 1867 – CONFEDERATION (BNA ACT) s.91 (24)
- 1872 – FIRST RESIDENTIAL SCHOOLS ARE SET UP
- 1876 – GOV'T. OF CAN. PASSES CONSOLIDATED INDIAN ACT
- 1880 – FIRST AMENDMENTS TO INDIAN ACT PASSED
- 1885 – RIEL REBELLION WHICH WAS CAUSED BY LAND DISPOSSESSION (CANADA HAD PURCHASED THE NORTHWEST TERRITORIES FROM THE HUDSON'S BAY COMPANY, WHICH WAS OCCUPIED BY THE MÉTIS AND OPENED IT UP TO SETTLERS FROM THE EAST
- 1900's – PERIOD OF ACTIVE ASSIMILATION POLICY (I.E. RESERVE PASS SYSTEM, BANNING OF POTLATCH ETC)

ASSIMILATION EFFORTS

- 1885 - Prohibition of several traditional Indian ceremonies, such as potlatches.
- 1894 - Removal of band control over non-Indians living on reserves. This power was transferred to the Superintendent General of Indian Affairs.
- 1895: Amended to outlaw all dances, ceremonies and festivals that involved the wounding of animals or humans, or the giving away of money or goods
- 1918 - Power to lease out uncultivated reserve lands to non-Indians if the new leaseholder would use it for farming or pasture.
- 1936: Amended to allow Indian agents to direct band council meetings, and to cast a deciding vote in the event of a tie.

LEGISLATIVE CHALLENGES

- Reference re: British North America Act, 1867 (U.K.), s. 91 IN THE MATTER OF a Reference as to whether the term "Indians" in head 24 of Section 91 of The British North America Act, 1867, includes Eskimo inhabitants of the Province of Quebec.
- Question posed to the Supreme Court of Canada - Does the term "Indians," as used in head 24 of section 91 of the British North America Act, 1867, include Eskimo inhabitants of the Province of Quebec?
- The answer of the Court to the question was in the affirmative.
- Basically, the two levels of government were arguing about who would be responsible for the welfare of the Inuit in northern Quebec.

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ASSIMILATION EFFORTS (CON'T.)

- The government continued to use the legislative powers to assimilate aboriginal peoples, and in particular, Status Indians.
- One of the most successful methods was to actively discriminate against aboriginal women, again, Status Indian women.
- After the passage of the 1951 *Indian Act*, a woman who lost her status upon marriage to a non-Indian or more specifically a non-status Indian was also liable to be involuntarily enfranchised.
- This could include a North American Indian from the United States, for example, as these individuals were not “status” Indians.
- Her minor children would be enfranchised with her, even if they had been born prior to the marriage.

MÉTIS CHALLENGES

- The Métis have had a much different historical experience than that of non-status Indians.
- Historically, they have had more success with recognition at the provincial level rather than the federal level.
- There was no legislative mechanism for the Métis at the federal level (i.e. equivalent to the *Indian Act*). However, they are constitutionally recognized.
- There is legislation in at least three provinces (i.e. Manitoba, Saskatchewan, Alberta).

Constitution Act, 1982

- Section 35:
- **Recognition of existing aboriginal and treaty rights**
- **35. (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- Definition of “*aboriginal peoples of Canada*”
- (2) In this Act, “*aboriginal peoples of Canada*” includes the Indian, Inuit and Métis peoples of Canada.

RECOGNITION

- The Métis gained recognition that finally gave some meaning to the acknowledgement found within the Constitution.
- In *R. v. Powley* the Supreme Court of Canada found in favour of the Métis
- It was the first major Aboriginal rights case concerning Métis peoples.
- The *Powley* decision resulted in “the *Powley* Test,” which laid out a set of criteria to not only define what might constitute a Métis right, but also who is entitled to those rights.
- Although the *Powley* decision defined Métis rights as they relate to hunting, many legal experts and Métis leaders view the *Powley* case as potentially instrumental in the future of recognizing Métis rights.

RECOGNITION (CONT.)

- Non-status Indians have also met with some success at court as well.
- *Daniels* finally laid to rest which government has a responsibility for non-status Indians.
- However, it was not a complete victory since the court did not side with the Plaintiffs on all matters put before them.

RECOGNITION (CONT.)

- The Supreme Court of Canada (SCC) found in favour of non-status Indians and Métis on some of the grounds (i.e. that they should be considered “Indians” under section 91 (24) of the *Constitution Act*, 1982).
- The SCC upheld the trial and appeal court decisions that non-status Indians and Métis seeking federal fiduciary and consultation obligations are not granted but rather should be decided on a case by case basis (para. 47)

IMPACTS

- non-status Indians gained the constitutional recognition through the *Daniels* case but it is interesting to note that they were already recognized as legitimate parties at treaty negotiations. (i.e. The Algonquins of Ontario Treaty Agreement-in-Principle signed October 18, 2016).
- The Métis are and have been regularly consulted as a legitimate aboriginal group when governments are negotiating and settling land claims (i.e. specific claims that involve land)

IMPACTS

- The government response has been muted.
- To date, the only message from INAC is thus:
- *The Government of Canada respects and welcomes the Supreme Court of Canada's Daniels Decision, rendered April 14th, 2016, and the clarity it brings. We will be reviewing it closely and working with Indigenous partners and others to ensure we are following court direction as we move forward. However, the decision does not provide Métis or non-Status individuals with new entitlements to registration as Status Indians. The current registration provisions within the Indian Act do not provide the Department with the authority to grant Métis or non-Status recognition; therefore, individuals should not apply under the Indian Act.*

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CONCLUSION

- At the end of the day, the federal government has not announced any new funding for the Métis and non-status Indians.
- In fact, it can be surmised that the existing funding will be further divided to include their additional obligations.
- This means that there will be less funding available across the board, especially for non-legislated obligations (i.e. non-insured health benefits, post-secondary education etc.).
- The Métis and non-status Indians in Canada have had a long and difficult journey to recognizing their place and contribution to Canada and society.

CONCLUSION

- The Métis and non-status Indians in Canada have had a long and difficult journey to recognizing their place and contribution to Canada and society.
- The journey is not over but there are positive signs (i.e. *Daniels*)
- Recognition is but a step to true reconciliation.